Supreme Court, U.S.
FILED

97-90 JUL 11 1997

OFFICE OF THE CLERK

Nos.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DR. JOHN PUCHNER, PETITIONER
v.
WILLIAM KRUZICKI,
ANNE C. HEPPERLA, f/k/a
ANNE C. PUCHNER, RESPONDENTS.

ON A PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Attorney Thomas Edward Hayes
161 West Wisconsin Avenue, Suite 4162
Milwaukee, WI. 53203-2602
(414)2719844

On February 11, 1994, the petitioner was found in contempt by a state court, and ordered incarcerated, for, among other things, allegedly having failed to pay child support. At the state court "hearing", there was neither sworn testimony, nor other items of evidence, made a part of any record. Notwithstanding that the subject order was never vacated, because the petitioner had completed the original sentence for contempt at the time the 7th Circuit Court of Appeals reviewed petitioner's appeal of the district court's denial of petitioner's application for a writ of habeas corpus, the Court of Appeals dismissed the petitioner's appeal as moot.

QUESTION PRESENTED FOR REVIEW- Whether the question of the constitutionality of the February 11, 1992 hearing, and orders produced therein, including one for contempt, is rendered moot because the petitioner served the original jail sentence prior to 7th Circuit Court of Appeals' review?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

TABLE OF CONTENTS

OPINIONS BELOW....1
JURISDICTION....2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED....3
STATEMENT OF THE CASE....4
REASONS FOR GRANTING THE WRIT....6
CONCLUSION....9

INDEX OF APPENDICES

1. Appendix A - Decision of the United States court of appeals dated April 15, 1997
2. Appendix B - Decision of the United States district court for the Eastern District of Wisconsin rejecting petitioner's Petition for Writ of Habeas Corpus dated February 21, 1996
3. Appendix C - Decision of the United States district court for the Eastern District of Wisconsin denying petitioner's motion to re-consider dated March 14, 1996
4. Appendix D - State court order, dated February 22, 1994, signed by Hon. Willis Zick
5. Appendix E - State court order, dated September 23, 1996, signed by Hon. Donald Hassin, Jr.
6. Appendix F - State court order, dated May 19, 1997, signed by Hon. Mark S. Gempeler

TABLE OF CITED AUTHORITIES
CASES

1. Dunn v. Blumstein, 405 U.S. 403, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) 6
2. More v. Oglivie, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969) 6
3. Ridgway v. Baker, 720 F.2d 1409 (5th Cir. 1983) 7
4. Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) 6
5. Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911) 6
6. Walker v. McLain, 768 F.2d 1181 (10th Cir. 1985) 7,8
7. Weinstein v. Bradford, 432 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975) 6

STATUTES AND RULES

1. United States Constitution, Article V 3,4
2. Wisconsin Constitution, Article I, sec. 1 3,4

CITATIONS (official and unofficial reports) OF OPINIONS AND ORDERS ENTERED

1. Puchner v. Kruzicki, et. al., 96-1731 In the United States Court of Appeals for the 7th Circuit
2. Puchner v. Kruzicki, et.al., 918 F. Supp. 1271 (E.D. WI. 1996)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The unpublished opinion of the United States court of appeals (#96-1731) appears at Appendix A.
The published opinion of the United States district court appears at Appendix B and is reported at 918 F.Supp. 1271 (E.D. Wis. 1996).

JURISDICTIONAL STATEMENT

1. The United States court of appeals decision to be reviewed was entered April 15, 1997. Appendix A. No petition for re-hearing was filed in the instant case.
2. Statutory provision conferring jurisdiction on this Court is 28 U.S.C. 1254(1)

CONSTITUTIONAL PROVISIONS, STATUTES ORDINANCES AND REGULATIONS

Article V, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article I, Sec. 1 Wisconsin Constitution

> **Equality; inherent rights.** SECTION 1. [As *amended* November 1982 and April 1986] All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed. [1979 J.R. 36, 1981 J.R.29, vote Nov. 1982; 1983 J.R.40, 1985 J.R. 21, *vote* April 1986]

STATEMENT OF THE CASE

The petitioner's petition for a Writ of Habeas Corpus (hereinafter "petition"), filed pursuant to 28 U.S.C. 2254, was filed on February 09, 1997. The pertinent portion of the petition attacked state court orders, including for contempt for failing to pay child support, and a corresponding jail sentence, that were issued following a "hearing", conducted on February 11, 1994. Appendix D. Notwithstanding the petitioner having served one jail sentence, pursuant to the subject order, the order was never vacated and remains in effect.

The constitutional basis, of petitioner's attack of the state court proceedings, was that the petitioner was deprived of his liberty, and is continually exposed to jail, without having been afforded due process of law at the time the contempt order was made by the state circuit court (the petitioner is currently serving a jail sentence for, once again, violating the subject order-Appendix F). Wisconsin Constitution, Article I, Sec. 1, U.S. Constitution, Article V. The factual basis for petitioner's attack was that the subject orders were issued notwithstanding the absence of any sworn testimony, or other evidence, being adduced at the "hearing"; a clear violation of petitioner's constitutional right to due process of law.

After an evidentiary hearing on February 21, 1996, the Hon. Robert W. Warren, United States district court judge for the Eastern District of Wisconsin, validated the constitutionality of the February 11, 1994 state court proceeding and rejected the pertinent portions of petitioner's petition. The petitioner timely filed a motion to re-consider the February 21, 1996 order. On March 14, 1996, Judge Warren denied petitioner's reconsideration motion. Appendix C.

By the time the appeal was briefed for the United States court of appeals for the 7th Circuit, the petitioner had served the entire, original sentence ordered by the state court on February 11, 1994.

The underlying orders, including the one for contempt, were not vacated as a result of petitioner's incarceration and remain in effect.

In addition to the attack on the constitutionality of the February 11, 1994 state court proceeding, the petitioner did argue, to the United States court of appeals, that the controversy was justiciable, and not moot, irrespective of the fact that, at the time the matter was briefed for the court of appeals, the petitioner had completed the entire, original sentence ordered by the state court following the February 11, 1994 "hearing". Among other grounds, the petitioner asserted that, as long as the unconstitutional orders remained in force and effect, the petitioner remained exposed to the deprivation of his liberty, without the due process of law, for violating the subject orders.

Throughout 1995 and 1996, there was a post-judgment divorce evidentiary hearing in the underlying divorce action in state court. In the order following the state court proceedings in 1995 and 1996, the state court judge did, among other things: a) incorporate findings from the subject February 11, 1994 "hearing" and, b) did impose additional jail sentences for petitioner's failure to fulfill the state court orders issued after the subject February 11, 1994 "hearing". Appendix E. Currently, the petitioner is serving an eight (8) month county jail sentence for, among other things, having violated components of the February 11, 1994 state court order (Appendix D) that were incorporated into Judge Hassin's September 23, 1996 order (Appendix E and Appendix F).

ARGUMENT

I. For the following compelling reasons, the petition for a writ of certiorari should be granted.

A. The 7th circuit court of appeals' remand to the district court for the eastern district of Wisconsin, with instructions to dismiss the case as moot, conflicts with the United States Supreme Court's application of the "capable of repetition, yet evading review" branch of the mootness doctrine in cases that date back to 1911. Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 31 S.Ct. 279, 55 L.E.D. 310 (1911); More v.Oglivie, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); S.E.C. v. Medical Committee for Human Rights, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972); Dunn v. Blumstein, 405 U.S. 403, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); Weinstein v. Bradford, 432 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975).

The "capable of repetition, yet evading review" branch of the mootness doctrine is limited to situations where, in the absence of a class action:

a) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and
b) there was a reasonable expectation that the same complaining party would be subjected to the same action again. Sosna, 419 S.Ct. at p. 400-02

The instant case clearly satisfies both of the Sosna elements:

a) the petitioner completed the original state court sentence prior to the court of appeals' ruling on the merits, and
b) there is a demonstrated probability that the petitioner

will again be found in contempt (he has been), and sent to jail (he is currently incarcerated), for, among other things, failing to abide by the subject state court orders that were issued on February 11, 1994 and that comprise the focus of petitioner's habeas corpus action.

B. The United States Court of Appeals for the 7th Circuit's decision at bar conflicts with the decision of the United States court of appeals for the 10th circuit, in its application of the mootness doctrine, in a case that is directly on point with the instant case. In Walker v. McLain, 768 F.2d 1181 (10th Cir. 1985), the court held that a father, who was found in contempt for failing to pay support and who had served the entire sentence before it was reviewed on appeal, could pursue his habeas corpus action, and that the same was not moot, because:

   a) it fell within the "capable of repetition, yet evading review" branch of the mootness doctrine, and
   b) because the contempt order was never vacated, the father may suffer collateral consequences flowing from his contempt conviction. Id. 768 F.2d at p. 1183. "The possible collateral consequences arising from defendant's still valid contempt conviction save this case 'from ending ignominiously in the limbo of mootness'. Ridgway v. Baker, 720 F.2d 1409-1411-12, n. 2 (5th Cir. 1983) (quoting Sibron, 392 U.S. at 55, 88 S.Ct. at 1898 finding case not to be moot because contempt conviction might be used in separate child support proceedings).

In the case at bar, as discussed earlier, the facts herein fall well within the parameters of the "capable of repetition, yet evading review" branch of the mootness doctrine. Furthermore, the petitioner's continual exposure to

incarceration, for future violations of the subject, February 11, 1994 order, , satisfies the "collateral consequences" criterion in McClain, supra. Having satisfied all criteria for all mootness cases, petitioner's cause should be saved from "...ending ignominiously in the limbo of mootness."

C. The state court's February 11, 1994 orders for back child support , contempt, and the corresponding jail sentence, were issued in the absence of any competent proof (there was neither sworn testimony nor exhibits accepted into evidence). The United States District Court recognized the void, but condoned the procedure. Because the Court of Appeals for the 7th circuit never reviewed the merits of the appeal, the state courts' order to throw the petitioner in jail, without evidence of wrongdoing, remains unchallenged against federal constitutional guidelines.

The chronology of events, including the petitioner's continued exposure to incarceration, together with the magnitude of the constitutional deprivation (loss of liberty), has so far departed from the accepted and usual course of judicial proceedings that this Court must exercise its supervisory power and grant this petition.

II. There is national importance for the Sup Ct. to decide this case because: the 7th Circuit Court of Appeals should not be at liberty to issue decisions that do not comport with doctrines of law, i.e. "likely to repeat, yet evades review" branch of the mootness doctrine, that have been recognized, and applied, by the United States Supreme Court since 1911; the United States Supreme Court should exercise its supervisory power to reconcile the division that exists between the 7th and 10th circuit courts of appeal, on the application of the mootness doctrine to habeas corpus proceedings, and; no court should ever condone a procedure that permits an order to issue, for a person to be incarcerated, absent competent proof of wrongdoing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

Attorney Thomas Edward Hayes
July 10, 1997

APPENDIX

A Puchner v. Kruzicki, Court of Appeals' decision Nos. 96-1731 (7th Cir. 1997)

B. Puchner v. Kruzicki, 918 F.Supp 1271 (E.D. Wis. 1996)

C. Hon. Robert Warren's 3-14-96 Order Denying Petitioner's Motion for Reconsideration

D. State court order, dated February 22, 1994, signed by Hon. Willis Zick

E. State court order, dated September 23, 1996, signed by Hon. Donald Hassin, Jr.

F. State court order, dated May, 1997, signed by Hon. Mark S. Gempeler

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 96-1731

JOHN D. PUCHNER,

Petitioner-Appellant,

v.

WILLIAM KRUZIKI, WAUKESHA COUNTY SHERIFF,

Respondent-Appellee,

and

ANNE C. HEPPERLA, formerly known as ANNE C. PUCHNER,

Intervenor.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 96-C-153ROBERT W. WARREN JUDGE

ARGUED NOVEMBER 13, 1996
DECIDED APRIL 15, 1997

Before CUMMINGS, RIPPLE, and DIANE P. WOOD, Circut Judges.

DIANE P. WOOD, Circuit Judge. Normally, the federal courtes do not become involved in child support disputes, as this is one of the matters most clearly allocated to the state courts in our federal system. In this case, however, John Puchner's failure to honor a child support agreement with his ex-wife, Anne Hepperla, became a federal case when he sought a writ of habeas corpus under 28 U.S.C. § 2254 challenging his incarceration pursuant to a contempt order entered by the state court judge. Puchner claimed before the district court, and now reiterates here, that the state court's contempt order was not supported by "competent proof," which in turn meant that his in-carceration violated federal due process principles. Since Puchner is no longer in custody for his contempt, the respondents suggest that this case has become moot in any event. We agree and hereby dismiss the appeal.

I

In December 1993, Hepperla filed a motion in the Waukesha County Circuit Court requesting that Puchner be held in contempt pursuant to Wis. Stat. § 767.30 for failure to pay child support and otherwise to comply with the parties' 1992 divorce judgment. Attached to that motion was an affidavit from her attorney detailing the various payments Puchner had failed to make. Puchner responded with a countertnotion and affidavit in which he asserted that he would "only address scheduling matters at this time" and that he "reserve[d] the right to provide fur-ther affidavits related to pending motions in the future." He indicated that he would present evidence at an unspecified future time of his attempts to pay child support; he attached no documentary evidence whatsoever to his countermotion.

Waukha Circuit Court Judge Willis Ziek held a hear-ing on Hepperla's motion on February 11, 1994, at which Puchner appeared telephonically at his own request. Hep-perla's attorney began by briefly reviewing the allegations of the contempt motion and his affidavit. Puchner responded that he had mailed the checks to Minnesota (the state where the divorce had been granted), and that Minnesota returned them to him. He alleged that he had the envelopes and uncashed checks to back up his

account, but he did not produce them for the hearing. Judge Zick then asked him how much money he had, in light of his allegation that the uncashed checks had been returned. At first Puchner refused to say, claiming that {'discovery" would be required on the matter, but eventually he declared that he was "flat broke." The hearing went on for some time, with Puchner interrupting both the court and Hepperla's attorney so often that the court threatened to hold him in contempt for his behavior at the hearing.

On the principal motion, Judge Zick decided that Puch-ner had contumaciously violated the court order requiring the child support payments. He relied both on Puchner's failure to submit any documentation of his attempted pay-ments that might have countered the statements in Hepperla's attorney's affidavit, and on his judgement that Puchner's credibility was poor. He sentenced Puchner to 60 days in the Waukesha County Jail, but he also ordered that Puchner could purge himself of his contempt by paying Hepperla an additional $100 per bimonthly check over the $290 already due. When Puchner persisted in his un-cooperative stance, he was arrested and incarcerated for the 60-day period. He served this sentence in fragments that were punctuated by various stays pending judicial proceedings. At this point, however, it is uncontested that he has completed serving the entire sentence.

The Wisconsin Court of Appeals affirmed the contempt order, rejecting the due process argument Puchner has raised here. That court found that the attorney's affidavit was sufficient to establish the prima facie case of con-tempt, and that the burden then shifted to Puchner to show that his failure to pay was justifled—a burden Puch-ner did not come close to meeting, given his refusal to provide any evidence whatsoever. The Wisconsin Supreme Court denied Puchner's petition for review. See *Puchner v. Puchner, 546* N.W.2d 469 (Wis. 1996). On habeas corpus review, the district court agreed on the due process point, *Puchner u. Kruzicki, 918 F.* Supp. 1271, 1278 (E.D. Wis. 1996), but it granted partial relief by ordering that Puchner be given a hearing to determine whether he was financially capable of purging himself of the contempt. The state court did so and concluded that Puchner's failur to pay

was willful and intentional. Puchner concedes tha he has not, to this day, paid the full arrearage.

II

The initial (and as it turns out, only) question we must consider is whether, as the respondents argue, Puchner's petition has become moot. It is undisputed that he is no longer in custody for his contempt of court. Because Puchner was "in custody" at the time he filed his habeas petition, he fulfilled the jurisdictional requirement of § 2254(a), but as we pointed out in *D.S.A. v. Circuit Court Branch* 1, 942 F.2d 1143, 1145 n.2 (7th Cir. 1991), this does not necessarily mean that he escapes mootness. The mootness inquiry turns instead on whether sufficient collateral con-sequences of the conviction persist to give the petitioner "a substantial stake in the judgment of conviction which survives the satisfaction of the sentences imposed on him." *Carafas v. La Vallee,* 391 U.S. 234, 237 (1968). See also *Sibron v. New York,* 392 U.S. 40, 50-58 (1968); *D.S.A.* 942 F.2d at 1146-46. The possibility that a conviction might be used to enhance punishment for a later crim is enough to defeat a finding of mootness. *Retmnitz v State's Attorney,* 761 F.2d 40S, 408 (7th Cir. 1985). Ir *Bryan v. Duckworth, 88* F.3d 431 (7th Cir. 1996), we noted that it is uniikely enough that convictions (or similar ad judications such as the results of a prison disciplinary pro ceeding) vwill have *no* collateral consequences that "it is the respondent's burden to plead and prove that the peti-tioner's conviction will not." *Id.* at 433.

This analysis, however, is based on two underlying as-sumptions: first, that the petitioner is attacking an under-lying criminal conviction or its equivalent, and second, that some significant collateral consequences can be identified. We have serious doubts as to whether a judgment find-ing someone in civil contempt qualifies as a "conviction" for purposes of the collateral consequences rule. (Incarcer-ation for civil contempt plainly qualifies as "custody" for jurisdictional purposes, but that is not the question before U8.) In *Lane v. Williams, 455 U.S.* 624 (1982), the Supreme Court distinguished between attacks on a sentence and attacks on an underlying conviction. This suggests that it is appropriate to look at the underlying ruling of

the district court to see if it is the type *of* judgment the *Lane* Court had in mind. Unlike even a misdemeanor conviction, which represents an adjudication of some wrong-l doing, civil contempt is a tool used by courts to compel compliance with their orders. The contemnor "holds the keys to the jailhouse" in his own hands, and compliance produces an immediate release.

We need not finally resolve whether a judgment of civil contempt is the kind of "conviction" contemplated by the collateral consequences rule, however, because it is clear that Puchner's contempt order did not carry the kind of collateral consequences that allow him to escape mootness now that he is released. In *Carafas,* the Supreme Court listed a number of typical consequences that were enough to save a case from mootness, which included the ability to engage in certain businesses, to vote in elections, or to serve as a juror. A judgment of civil contempt does not threaten any of these interests. Although we have rejected the argument that collateral consequences should not be found when they are of the petitioner's own making—in particular, the possibility of enhancement of a future criminal sentence, when the petitioner is presumably able to avoid the consequences by refraining from committing further crimes—that rule is less helpful when the underlying conviction itself is wholly avoidable, as is the case with civil contempt.

This case is instead closer to the situation presented to the Fourth Circuit in *Broughton v. North Carolina,* 717 F.2d 147 (4th Cir. 1983). There the petitioner had been found guilty of criminal contempt and had completed serving a 30-day sentence that was imposedv The Fourth Circuit found that his habeas petition was moot, because there were no serious collateral consequences in the sense of civil disabilities. This conclusion flowed in part from the nature of contempt orders themselves. Even though civil and criminal contempt differ in important respects, we consider *Broughton* helpful in evaluating Puchner's analogous arguments about civil contempt.

Here, Puchner fears that if he is held in criminal or civil contempt again for willfully failing to satisfy his support obligation, the present adjudication of civil contempt might be used to enhance his sentence. Remedial contempt pro-ceedings to enforce a support order are punishable by a sentence of up to six months in Wisconsin, see Wis. Stat. § 785.04(1)(b), and felony criminal sanctions for nonsupport are also available under Wis. Stat. § 948.22. Nevertheless, we find that this is too speculative a basis for sustaining the § 2254 petition. Nothing in Wisconsin law suggests that an earlier finding of civil contempt could be used to enhance a sentence in a felony proceeding for nonsupport, and a civil or remedial contempt order would, as always, be dischargeable upon full compliance with the court's order.

We therefore VACATE the decision below and REMAND with instructions to dismiss the case as moot.

A true Copy:
Teste:

_____
Clerk of the United States Court
of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DR. JOHN PUCHNER,

Petitioner,

v. Case No.: 96-C-153

WILLIAM KRUZICKI,
Waukesha County Sheriff,

Respondent.

DECISION AND ORDER

Before the Court is Dr. John Puchner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the above-captioned matter. On February 5, 1996, the petitioner was incarcerated and began serving a 60-day sentence for contempt in the Waukesha County Huber Facility. On February 13, 1996, this Court ordered a STAY of state court proceedings pursuant to 28 U.S.C. § 2251 and held an expedited hearing on February 15, 1996 at 1 1:00 a.m. For the following reasons, Dr. Puchner's Petition is GRANTED. Dr. Puchner is to be afforded a hearing before a circuit court judge in order to demonstrate that his inability to meet the purge conditions is not willful and intentional.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 9, 1996, the petitioner Dr. John Puchner filed a Petition Under 28 U.S.C. 2254 for Writ of Habeas Corpus by a Person in State Custody (Petition) challenging his incarceration for civil contempt for allegedly willfully failing to pay court ordered child support. On February 12, 1996, a Brief in Support of Petition for Writ of Habeas Corpus was submitted by petitioner. On February 13,

1996, after a preliminary review of the Petition and Brief, this Court ordered a stay of state court proceedings, ordered the respondent to show cause why the Writ should not be granted and ordered the petitioner to be released forthwith pending resolution of the Writ. On February 15, 1996, a hearing was held before this Court, in attendance were Dr. John Puchner represented by his attorney Thomas E. Hayes, Steven Schmitz attorney for Waukesha County Corporation Counsel representing Waukesha County Sheriff William Kruzicki, and Bruce O'Neill attorney for petitioner's former wife, Anne Hepperla. The Department of Justice for the state of Wisconsin reviewed the pleadings and decided that the Department did not have a role in this matter. The underlying circumstances in this cause of action involve a divorce and ensuing custody battle marked by intense animosity and bitter feelings. By way of brief background, the petitioner and his wife, now known as Anne C. Hepperla, were divorced in Minnesota in Hennepin County, on October 27, 1992, following a three-year marriage. (Exh. 1.) The marriage produced one child, Paul Andrew Puchner, born April 4, 1992. The Minnesota judgment awarded legal custody of Paul to both parties with his physicai custody being awarded to Ms. Hepperla and ordered Dr. Puchner to pay $480.00 per month for child support. (Exh. 1.) The venue of the case was transferred to Waukesha County in 1993. On December 8, 1993, Ms. Hepperla filed a Motion requesting that Dr. Puchner be held in contempt for his refusal to sign appropriate health insurance forms, pay child support and provide Ms. Hepperla's attorney with a copy of his work schedule. (Exh. 2.) On December 22, 1993, the Honorable Willis Zick, Waukesha County Circuit Court Judge, requested petitioner's appearance at a hearing scheduled for February 11, 1994. (Exh. 3.) On January 31, 1994, the petitioner submitted a notice of countermotion to Judge Zick requesting, inter alia, that he appear via telephone. (Exh. 4.) The February 11, 1994 hearing before Judge Zick | and what transpired is currently being considered by this Court.

At the February 1 1, 1994 hearing before Judge Zick, Anne Hepperla and her attorney Bruce O'Neill were present in person; the petitioner appeared pro se via telephone from Michigan. The transcript of the hearing before Judge Zick indicates that the hearing was scheduled to address the motion dated December 6, 1993 filed by Ms. Hepperla. Ms. Hepperla first requested that Dr. Puchner pay $1,500.00 to Dr.

Matusiak a court appointed psychologist; second, that Dr. Puchner pay Ms. Hepperla $1,095.00 for Dr. Matusiak's bill already paid by Ms. Hepperla; and third that Dr. Puchner pay $150.00 which was 1/2 the placement study fee for the Waukesha County Family Court Counseling Services. (Exh. 5) Transcript of Februarv 11, 1994 Hearing "Trans." at 2-3) Next, Ms. Hepperla asked that Dr. Puchner be held in contempt for his refusal to sign health insurance forms (Trans. at 3-4) and for refusal to pay child support. (Trans. at 7.) Mr. O'Neill, Ms. Hepperla's attorney, argued that Dr. Puchner was in child support arrearage totaling $2,920.00 through the first half of February, 1994 and requested purge conditions of an extra $200.00 per month. The petitioner responded, inter alia, that he had been paying child support to the state of Minnesota, arguing that he was under obligation to pay the state of Minnesota, and that the checks were being returned to him. Dr. Puchner requested "discovery" in order to present checks and receipts. (Trans. at 13-14.) After a rather convoluted discussion, Judge Zick found Dr. Puchner in contempt for not paying the $150.00 toward the $300.00 study fee and for failure to pay child support totaling ... "$2,920.0 under the S480.00 per month order." (Trans. at 19-22.) The exact transcript reads at page 22:

> THE COURT: So the Court will find he owes $2920 under the $480 per month order then, based on Mr. O'Neill's statement, which the Court find much more credible than Dr. Puchner's semi-comprehensible statements.So then we will find him in contempt for not paying that and sentence him to 60 days in the county jail for that contempt. We'll find he has the ability to pay that with his $32,000 salary. So, the Court will find it's an intentional failure -- refusal to pay. And then, Mr. O'Neill, do you want him to purge that by paying the $100 a month, is that what -- ... (Trans. continued at 23)

> THE COURT: Okay. So, we will order then that he doesn't have to serve the sentence, as long as he pays

the payments, $480 from now on, plus a hundred a month.

MR. O'NEILL: It's 200 a month, a hundred per paycheck|

THE COURT: A hundred per check from now on. So he will have to pay $340.00 from each of his checks received subsequent to today then. If he does that, he will be purging that contempt finding and will not have to go to jail. And then if he does not do that, Mr. O'Neill will send us a letter with an order to execute the arrest warrant. And then the next time he is in Wisconsin, the sheriff's department will pick him up and he can serve his 60 day jail sentence. (Trans. continued at 25)

THE COURT: Okay. So, half of that he owes her, what would get added on, would be the twenty-nine twenty on child support, the hundred fifty on the study, half of whatever-- half of the total of Dr. Matusiak, and then whatever is short on Prudential. Those would be the items added on to the purge figure then. Fees, we'll worry about that when we come back here for our trial. (Trans. continued at 27)

MR. PUCHNER: i'd ask if you read the affidavit, my counter motion?

THE COURT: I don't read affidavits at all. If you told me everything --

MR. PUCHNER: You do not read --

THE COURT: I do not read people's affidavits and things until I get --

MR. PUCHNER: -- supporting documents.

On February 21, 1994 Judge Zick ordered that Dr. Puchner be found in contempt for (1) his intentional refusal to pay t 150.00 in reimbursement for one-half of the cost of the placement study executed by the Waukesha County Family Court and (2) intentional refusal to pay child support, an arrearage totaling . $2,920.00(Exh 6)

The February 21, 1994 Order sentenced Dr. Puchner to 60 days in the Waukesha County Jail and imposed purge conditions of $680.00 per month. (Exh. 6.) On March 4, 1994, the petitioner filed a pro se motion asking foran opportunity to explain his inability to pay the court ordered payments. (Exh. 7.)

The petitioner maintains that this Motion was never heard and that he has never . been given an opportunity to explain his inability to purge himself of the contempt conditions. Judge Zick retired from the Waukesha County Circuit Court bench a approximately nine months later the Honorable Donald Hassin was appointed to replace Judge Zick on approximately November 14, 1994. (Exh. 13.) On September 2, 1994, the petitioner was incarcerated as he arrived in Wisconsin tc visit with his son. While in jail for the civil contempt charges, the petitioner filed with the circuit court a request to review his financial inability to pay the purge conditions. Again, this matter was never scheduled for a hearing. Because an appeal was pending before the Wisconsin Court of Appeals regarding the contempt order, the petitioner, having obtained counsel, was released from custody and allowed to return to Michigan. On November 8, 1995, the Wisconsin Court of Appeals sustained the trial court's order adjudging the petitioner in contempt concluding that the contempt order was valid. (Exh. 9: Puchner v Puchner, 542 N.W.2d 237, 1995 WL 654054 (Wis. App. 1995).) On January 17, 1996, the Wisconsin Supreme Court declined to review petitioner's appeal. On January 19, 1996, and on February 5, 1996, the petitioner filed motions with the trial court requesting a hearing concerning his inability to pay the purge conditions ordered by Judge Zick. (Exhs. 10, 12.) On January 19, 1996, Judge Donald Hassin denied Dr. Puchner's request for a hearing. (Exh. 11.) On February 5, 1996, petitioner was incarcerated

and began serving a 60-day sentence for contempt in the Waukesha County Huber Facility (the Court notes that petitioner had previously served three days during September, 1994 toward his 60 day sentence) for failing to pay 1/2 cost of a placement study and for failing to pay $2,920.00 in child support.

In his Petition for Writ of Habeas Corpus, the petitioner argues that at the February 11, 1994 hearing wherein the petitioner was found in contempt, the court "took no sworn testimony, failed to accept any exhibits into evidence, refused to read any affidavits, and did not look at [Dr. Puchner]'s evidence before adjudging [Dr. Puchner] in contempt and establishing purge conditions that required payment of $680.00 per month." (Petition at 5.) Furthermore, the petitioner continues to request a hearing in order to explain the basis for not purging his contempt. Thus, the petitioner argues that his incarceration violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. This Court held a hearing on Thursday, February 15, 1996 and this matter is ready for resolution.

II. LEGAL STANDARD

The Writ of Habeas Corpus, an exceptional remedyf is designed as a "bulwark against convictions that violate fundamental fairness." Engle v. Isaac, 456 U.S. 107, 126 (1982). In the exercise of its habeas jurisdiction, a federal court may grant relief only if the petitioner shows that he is in custody "in violation of the Constitution or laws of the United States." 28 U.S.C. § 2254(a); See Estelle v. McGuire, 112 S. Ct. 475, 480 (1991). Before a district court may consider a habeas corpus petition on its merits, it must determine that each clainn has been "exhausted" in the state courts. Farrell v. Lane, 939 F.2d 409, 410 (7th Cir.), cert. denied, 112 S. Ct. 387 (1991). Claims are exhausted when they have been presented to the highest state court for a ruling on the merits of the claims or when state remedies no longer remain available to the petitioner. Engle, 456 U.S. at 125 n.28; Farrell, 939 F.2d at 410.

Before entertaining the merits of a petition for habeas corpus, a federal court must determine whether the claims in the petition have been procedurally defaulted. Jones v. Washington, 15 F.3d 671, 674

(7th Cir.), cert.denied, 114 S. Ct. 2753 (1994). "Procedural default in cases under § 2254 depends on state law." Jenkins v. Gramley, 8 F.3d 505, 507 (7th Cir. 1993). "When a state would treat complete failure to present a claim as forfeiture, the federal court may enforce the state's bar on collateral review." Reese v.Peters 926 F.2d 668, 671 (7th Cir. 1991). To escape procedural default, the claim must be presented so as to "alert fairly the state court to the federal nature of the claim and to permit that court to adjudicate squarely the issue." Verdin v.O'Leary, 972 F.2d 1467, 1474 (7th Cir. 1992). Procedural default may be excused only where a petitioner shows "good cause for the default and actual prejudice stemming from the default." Lemons v.O'Sullivan, 54 F.3d 357, 360 (7th Cir.), cert. denied, 116 S. Ct. 528 (1995). When hearing a petition for habeas corpus, a finding of fact is accorded a presumption of correctness by the federal court. 28 U.. § 2254(d). In order to overcome this presumption, the petitionermust "establish by convincing evidence that the factual determination by the State court was erroneous." Id.

III. ANALYSIS

Before a state prisoner can raise a claim in federal habeas corpus proceedings, he must exhaust state remedies. See 28 U.S.C. § 2254(b). According to the Seventh Circuit:

> Before considering a petition for habeas corpus on its merits, a district court must make two inquiries -- whether the petitioner exhausted all available state remedies and whether the petitioner raised all his claims during the course of the state proceedings. If the answer to either of these inquiries is "no" the petition is barred.

Henderson v. Thieret, 859 F.2d 492, 496 (7th Cir. 1988), cert. denied, 490 U.S. 1009 (1989). The Court concludes that Dr. Puchner has, in fact, exhausted his state court remedies. The highest state court was afforded a fair opportunity to rule on the factual and theoretical substance of Puchner's claims. Therefore, because no state remedy is currently available to him, the exhaustion requirement is

satisfied. Next the Court determines whether any of Puchner's claims are procedurally defaulted. Procedural default "occurs when a claim could have been but was not presented to the state court and cannot, at the time the federal court reviews the habeas petition, be presented to the state court." Resnover v. Pearson, 965 F.2d 1453, 1458 (7th Cir. 1992), cert. denied, 113 S. Ct. 2935 (1993). Because Puchner's grounds for relief were presented to the state court, procedural default is not at issue. Puchner's claims satisfy the procedural requirements of section 2254, and therefore may be addressed on the merits. Section 2254 authorizes habeas relief to remedy judgments issued "in violation of the Constitution or laws and treaties of the United States," and may not be invoked to correct erroneous interpretations of state law which fail to reach the level of Constitutional violations. So doing, the Court finds that Puchner is entitled to relief.

The two issues before this Court are whether (1) Dr. Puchner was denied due process at the February 11, 1994 hearing before Judge Zick; and (2) whether Dr. Puchner was denied due process for failing to be afforded a hearing in order to allow him to explain why he was unable to purge the contempt conditions. The Court concludes that Dr. Puchner was not denied due process at the hearing held before Judge Zick on February 11, 1994, however, Dr. Puchner requested a hearing in order to explain his inability to purge himself of the contempt conditions and has never been afforded a hearing, in violation of the Due Process Clause of the United States Constitution.

A. Whether the February 11, 1994 Contempt Order is Valid.

In the Petition, petitioner argues that 11) the trial court did not consider any competent evidence before finding him in contempt on February 11, 1994; (2) the February 11, 1994 contempt order is invaiid because the trial court failed to consider the possibility of a wage assignment order in lieu of contempt; and (3) the moving papers and the trial court's order for appearance fail to expressly mention that the appellant may be sentenced to jail if he is found in contempt. The petitioner bears a heavy burden because the trial

court's findings of fact in a contempt proceeding are conclusive unless clearly erroneous. See Town of Seymour v. City of Eau Claire, 112 Wis.2d 313, 318, 332 N.W.2d 821, 823 (Ct. App. 1983). Moreover, Section 2254 does not authorize this Court to sit in appellate review of state court decisions. See Brecht v. Abrahamson, 113 S. Ct. 1710, 1719 (1993) .

The record before this court reveals that on or about December 8, 1993, Ms. Hepperla filed a Motion with the Circuit Court giving petitioner notice that pursuant to Wis. Stats. § 767.30(3) Ms. Hepperla was requesting that Dr. Puchner be held in contempt for, inter alia, his failure to pay child support. (Exh. 2 at 2.) Thus the petitioner was put on notice that a pending Motion requested he be held in contempt. On December 22, 1993, Judge Zick scheduled a hearing for February 11, 1994 pursuant to Wis. Stats. § 767.125. (Exh. 3.) In response, petitioner filed a Countermotion reserving "the right to respond, via countermotions, affidavits, and supporting documents." (Exh. 4 at 2.) Petitioner's attached affidavit stated he opted to address only scheduling matters at this time and stated "I am obligated to pay child support in Wisconsin and I have." (Exh. 4 at 5.) Therefore, Dr. Puchner was afforded sufficient notice that the hearing to be held was for the purpose of determining whether he was in contempt of court for faiiure to pay child support, and Dr. Puchner did not object to the notice provided to him. The Wisconsin Court of Appeals held that petitioner consequently waived his right of review of those contentions. Puchner, 1995 WL 654054, at *2. As previously stated, under Section § 2254, "when a state would treat complete failure to present a claim as forfeiture, . . ., the federal court may enforce the state's bar on collateral review." Reese, 926 F.2d at 671.

At the February 11, 1994 hearing before Judge Zick, it is undisputed and the transcript demonstrates that the Court took no sworn testimony, failed to accept any exhibits into evidence and failed to read the petitioner's affidavit before finding the petitioner in contempt. Marrisoe of Van Offeren v. Van Offeren, 173 Wis. 2d 482 (Ct. App. 1992) states:

> It is true that mere inability to pay support or maintenance cannot support a finding of contempt. Burger v. Burger, 144 Wis. 2d 514, 528, 424 N.W.2d 691, 697 (1988). However, a person may be held in contempt for failure to pay where that failure is willful and contemptuous and not the result of an inability to pay. Id. In a contempt proceeding, the burden of proof is on the person against whom the contempt is charged to show that the conduct is not contemptuous. Besaw v. Besaw, 89-Wis. 2d 509, 517, 279 N.W.2d 192, 195 (1979) .

The case law cited by the Wisconsin Court of Appeals in Puchner agrees that it is the alleged contemnor's burden to demonstrate that his or her conduct is not contemptuous. Puchner, 1995 WL 654054, at *2 (citing Noack v. Noack, 149 Wis.2d 567, 575, 439 N.W.2d 600, 602 (Ct. App. 1989)). The record demonstrates that Attorney Bruce O'Neill established a prima facie case that Dr. Puchner violated the child support order by failing to pay support for specific time periods. Consequently, the burden then shifted to Dr. Puchner to prove that his failure to pay was not contemptuous. Judge Zick admitted that he did not read the petitioner's affidavits due to a lack of supporting documen ts. Although this Court finds the February 11, 1994 hearing somewhat heavy-handed, as the appellate court notes Dr. Puchner "did not present documents in support of his contentions at the hearing or in his countermotion." Instead, the petitioner viewed his countermotion as opportunity to reserve the right to respond to the motions made by Mr. O'Neill. Unfortunately, this was not the proper procedural stance. In a remedial contempt proceeding, once Mr. O'Neill made a prima facie showing of a violation of a court order, the petitioner was required to demonstrate that his conduct was not contemptuous. When asked whether the petitioner had the child support money sent back from Minnesota, the petitioner responded "I have none. I have absolutely no money because of legal costs and things for my rights to present before a Court." (Trans. at 14.) The petitioner's response to Judge Zick, whether due to frustration, evasiveness, or a

misunderstanding, failed to meet the required burden. "Where the alleged contemnor chooses not to present evidence-on his or her own behalf, the trial court is not precluded from finding that the underlying conduct is contemptuous." Puchner, 1995 WL 654054, at *3 (citing Noack, 149 Wis.2d at 575, 439 N.W.2d at 603).

As for the petitioner's contention that the trial court failed to consider the possibility of a wage assignment order in lieu of contempt under Wis. Stats. § 767.265, this Court is in agreement with the analysis of the Wisconsin Court of Appeals. See Puchner, 1995 WL 654054, at *3. In an action brought under 28 U.S.C. § 2254, the factual determinations of the state trial and appellate court are "presumed to be correct." 28 U.S.C. § 2254(d) (providing that "a determination after a hearing on the merits of a factual issue . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct"); Lewis v. Huch, 964 F.2d 670, 671 (7th Cir. 1992). During the February 11, 1994 hearing Dr. Puchner discussed how a wage assignment would not be feasible stating "[t]here simply isn't the money to do that." (Trans. at 15.) Thus, the possibility of wage assignment was raised and rejected by both parties, therefore, "judicial estoppel prevents [petitioner] from claiming on appeal that a wage assignment should have been utilized." Puchner, 1995 WL 654054, at *3.

Finally, petitioner argues that he should have been put on notice that he could be sentenced to jail if he is found in contempt. This argument was not explicitly addressed by the Wisconsin Court of Appeals, and therefore, it is unclear whether this claim is consequently procedurally defaulted. Nonetheless, the Court finds this contention without merit. In a remedial contempt proceeding, the contemnor's ability to avoid the sanction by satisfying the purge conditions "obviates the need for due process." In re the Paternity of CY C.I., 196 Wis. 2d 964, 539 N.W.2d 703, 704 (Ct. App. 1995). Wis. Stats. § 767.305 requires that the party be given notice and a hearing, which was complied with by the Wisconsin circuit court. Therefore, the Court concludes that the underlying contempt charge is valid.

B. Whether the Petitioner was Afforded a Hearing in Order to Explain his Inability to Purge Himself of the Contempt Conditions.

At the hearing before this Court on February 15, 1996, it was undisputed that the petitioner has never been granted a hearing in order to explain the basis for his failure to comply with the purge conditions. Wisconsin case law clearly states "[w]hen a contemnor's liberty interests are at risk he or she must be given the opportunity to show the court that the failure to comply with the purge condition was not willful and intentional." State ex. rel. V.J.H. v. C.A.B., 163 Wis. 2d 833, 843, 472 N.W.2d 839, 843 (Ct. App. 1991). On appeal of the contempt order, the Wisconsin Court of Appeals found that the petitioner "did not request a hearing but obtained a stay of the order." And "tw]ithout the request, the trial court was not obligated to afford [petitioner] an additional hearing." Puchner, 1995 WL 654054, at *4. However, the evidence submitted before this Court indicates that the petitioner requested a hearing on numerous occasions and, in fact, has never been granted a hearing. The purpose of such a hearing is to allow the contemnor "the opportunity to show the court that the failure to comply with the purge condition [i]s not willful and intentional." Id. (citation omitted). The evidence submitted before this Court unequivocally demonstrates that the petitioner requested a hearing on numerous occasions. On March 14, 1994, appearing pro se, the petitioner filed a Motion to Reconsider. (Exh. 7.) This Motion states "I cannot afford to pay $680.00 per month" (the purge conditions) and requests a hearing before Judge Zick. When the petitioner was incarcerated in September, 1994, he made two requests for a hearing regarding his inability to purge himself of the contempt conditions. (Exhs. 14, 15.) A letter to Judge Hassin dated December 21, 1994 from petitioner requested a hearing on all pending motions including motions dated 6/14194, 3/19/94 and 1122/93. (Exh. 38.) At the evidentiary hearing held before this Court, the petitioner, under oath on the witness stand, stated that he had not withdrawn any motions with regards to his continued request for a hearing and his inability to purge himself of the contempt conditions. On cross-examination, Attorney O'Neill, moved into evidence the May 4, 1994 Order of Judge Zick

withdrawing all Motions, arguing that the petitioner waived his right for a hearing regarding the contempt charges (Exh. 28.) However, the petitioner stated that he withdrew all pending motions regarding child visitation which was the subject of an April, 1994 hearing. On January 17, 199E, the petitioner moved the circuit court for a hearing concerning his ability to fulfill the purge conditions established by Judge Zick. (Ex. 10.) However, on January 19, 1996, Circuit Court Judge Hassin summarily denied the request. (Ex. 11.) Again, on February 5, 1996, the petitioner requested a hearing to address the petitioner's inability to fulfill Judge Zick's purge conditions. Therefore, this Court finds that the petitioner, in fact, did request a hearing in order to explain why he was not able to pay the purge conditions, and has never been granted such a hearing.

The Wisconsin Court of Appeals decision, which addressed the validity of finding petitioner in contempt. failed to recognize that petitioner's pro se request for a hearing, dated March 1994, however unartfully pleaded, was a request nonetheless for a hearing to explain why he was not able to pay the purge conditions. Moreover, at the evidentiary hearing held before this Court, petitioner was quite adamant that he never waived his right to the hearing. The court in V.J.H. stated: "We conclude that when a contemnor requests a hearing before being recommitted to the county jail or to modify a purge condition, the trial court is obligated to afford the contemnor a meaninaful hearing." V.J.H., 472 N.W.2d at 844 (emphasis added). In V.J.H., the case was remanded to the trial court to conduct a hearing consistent with this holding. Therefore, this Court orders that the petitioner must be afforded a meaningful opportunity to address the basis for his noncompliance with Judge Zick's purge conditions. Moreover, this Court agrees with petitioner that there is nothing that permits a finding that the petitioner's requests made post-appeal are untimely. Furthermore, even if the petitioner did request a hearing at any point during the pendency of his appeal, the trial court would have been unable to entertain such a request. Therefore, because the petitioner has not been granted a hearing, this Court holds that petitioner's due process rights have been violated. Pursuant to State ex. rel. V.J.H. v. C.A.B., 163 Wis. 2d 833, 472 N.W.2d 839 (Ct. App. 1991) the Court orders a hearing before a circuit court judge where the burden will be on Dr. Puchner to satisfy the court that the purge conditions are not feasible and that his refusal to pay is for a

reason other than a wiltful and intentional avoidance of payment. The Court holds that the lack of procedural protections afforded in a remedial contempt proceeding, when compared to punitive contempt, require a hearing be made available upon petitioner's request in order to protect petitioner's due process rights and comply with Wisconsin case law.

Having therefore granted the Writ of Habeas Corpus with regard to petitioner's request for a hearing, the Court feels compelled to comment on the underlying proceedings. The three-hour hearing held before this Court clearly demonstrates the vitriolic nature of this custody battle. Both parties are obstinate and entrenched in their thinking. The Court requests that this ruling will not continue to fuel the fire of animosity which currently burns brightly. Although the Court cannot require this, the Court requests both parties to step back and critically assess their behavior in these proceedings, the well-being of a child is at stake.

IV. CONCLUSION

For the foregoing reasons, IT IS ORDERED that Puchner's petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is GRANTED. Consistent with due process, Dr. Puchner is to be afforded a hearing before a circuit court judge in order to demonstrate that his inability to meet the purge conditions is not willful and intentional, any further incarceration is contingent upon the findings of that hearing.

So ordered this 21st day of February, 1996 at Milwaukee, Wisconsin.

/s/ Robert W. Warren
United States District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

DR. JOHN PUCHNER,

Petitioner, Case No.: 96-C-153

VS

WILLIAM KRUZICKI,
WAUKESHA COUNTY SHERIFF,

Respondent.

DECISION AND ORDER

Before the Court is petitioner Dr. John Puchner's Motion to Reconsider this Court's February 21,1996 Order, therein the Court found that petitioner was validly found in contempt before the Honorable Willis Zick, Waukesha County Circuit Court Judge on February 11, 1994, however, the Court found that petitioner was never afforded a hearing in order to explain his inability to purge himself of the contempt conditions in violation of the Due Process Clause of the United States Constitution. The Court ordered a circuit court judge to afford Dr. Puchner a hearing. The petitioner requests the Court revisit its February 21,1996 Order due to what the petitioner contends are factual errors committed by the Court in finding the contempt order valid. For the following reasons, the petitioner's Motion is DENIED,

Motions for reconsideration are usually filed in civil litigation in compliance with Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"). Rule 60(b), which contains six subparts, "is a rule of general application, providing relief from all types of final judgments." C.K.S. Eng'rs. Inc. v. White Mountain Gypsum Co., 726 F.2d 1202,1205 (7th Cir.1984) {"the general rule in this circuit is that

relief from a judgment under [R]ule 60(b) is an extraordinary remedy and is granted only in exceptional circumstances."). A motion thereunder requests an "extraordinary remedy," Andrews v. Heinold Commodities, Inc., 771 F.2d 184, 188 {7th Cir. 1985); C.K.S., 726 F.2d at 1204-05, which may be granted only if the movant shows "[exceptional] circumstances that create a substantial danger that the underlying judgment was unjust." Nelson v. City Colleges of Chicago, 962 F.2d 754, 755 (7th Cir.1992). Accord Del Carmen v. Emerson Elec. Co., Commercial Cam Div., 908 F.2d 158, 161 (7th Cir. 1990); 3 Penny Theater Corp. v. Plitt Theaters, Inc., 812 F.2d 337, 340 (7th Cir. 1987). This is especially true under Rule 60(b)(6). Although this "catch-all provision," authorizes the district court to vacate its order or judgment for "any reason justifying relief from the operation of the judgment," Rule 60(b)(6) is not as open-ended as its language suggests. Relief is available only (1) if Rules 60tb)(1) through (5) are inapplicable; and (2) if the district court, in its sound discretion, finds that equitable action is necessary to accomplish justice. Peacock v. Board of Sch. Commtr, 721 F.2d 210, 214 (7th Cir.1983) (per curiam). A Rule 60(b) motion is not a substitute for direct appeal, Del Carmen, 908 F.2d at 161; Andrews, 771 F.2d at 188, or a motion to alter or
amend judgment under Rule 591e). Parke-Chapley Constr. Co. v. Cherrington, 865 F.2d 907, 915 (7th Cir. 1989). Nevertheless, the "stringent standards [of] Rule 60(b) 'should be liberally applied to accomplish justice,"' Andrews, 771 F.2d at 188, and a motion thereunder "may be granted at the broad discretion of the trial judge." Del Carmen, 908 F.2d at 161 (quoting Reinsurance Co. of Am., Inc. v. Adminstratia Asigurarilor de Stat, 902 F.2d 1275, 1277 (7th Cir. 1990)).

Rule 60(b)(1) provides that, "[ojn motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a finai judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect." This rule "is intended to allow clear errors to be corrected without the cost and delay of an appeal." Bank of California v. Arthur Anderson & Co., 709 F.2d 1174, 1177 (7th Cir. 1983). In order to obtain relief under Rule 60(b)11) for errors caused by his or her own omissions, a party must provide some justification beyond mere failure to exercise due care. Lomas and NettlesOn Co. v. Wiseley, 884 F.2d 965, 967 (7th Cir.

1989j. A party is not entitled to relief under Rule 60(b)(1) if his or her mistakes, inadvertence, or neglect was caused by ignorance, negligence, or carelessness. Id. Relief is also available under Rule 60(b)(1) for clerical mistakes or other inadvertence committed by the court. Parke-Chapley, 865 F.2d at 915; Bank of California, 709 F.2d at 1176. To prevent a party from side-stepping the thirty-day deadline for taking appeals, most courts require that a Rule 60(b)(1) motion to correct the district court's own clerical errors be filed within 30 days of judgment. Bank of California, 709 F.2d at 1177.

Because Rule 60(b)(1) may not be used as an alternative to an appeal in order to correct mistakes of law, a party may not bring such a motion to argue a mistake of law and then appeal the district court's ruling in order to avoid the thirty-day deadline for advancing a direct appeai. Parke-Chapley, 865 F.2d at 915; Bank of California, 709 F.2d at 1177-78.

This court has carefully reviewed its decision finding the underlying contempt order valid and concludes that the Court is correct in its hoiding. At the February 11, 1994 contempt hearing before Judge Zick, it is undisputed and the transcript demonstrates that Judge Zick took no sworn testimony, failed to accept any exhibits into evidence and failed to read the petitioner's affidavit before finding the petitioner in contempt. The Court, however, found that Dr. Puchner was validly held in contempt by Judge Zick because he was put on notice that the February 11, 1994 hearing was a contempt hearing, and Dr. Puchner did not present any supporting documents in support of his contentions at the hearing. In his Motion for Reconsideration, the petitioner argues that he advised Judge Zick that he was not available to appear in person on February 11, 1994, via a letter dated January 11, 1994, and requested that the hearing be rescheduled. The Court notes that this January 11, 1994 letter attached to petitioner's Motion for Reconsideration was not submitted into evidence at the Court's expedited earing held on February 15, 1996.The record demonstrates that on December 22, 1993, Judge Zick ordered the petitioner to appear in person at a hearing scheduled for February 11, 1994, in response to a motion filed by petitioner's former wife seeking to find petitioner in contempt for nonpayment of child support. (Exhs.2, 3.) On January 11,1994, petitioner sent a letter requesting the hearing to be rescheduled, and on January 31,1994, requested to

be able to appear via telephone. (Exh. 4.) While Judge Zick allowed petitioner to appear via telephone, there is nothing in the record to sugges the Judge Zick rescheduled the conternpt hearing. The February 11, 1994 hearing was held, in part, to determine whether Dr. Puchner should be held in contempt for nonpayment of child support. The fact that Dr. Puchner wanted the hearing to be rescheduled, and despite his request, the hearing went forward on February 11, 1994 is irrelevant. In protracted litigation, parties will most likely be inconvenienced by scheduled hearing dates and a Judge is not expected to accommodate the schedules of all concerned parties.

The petitioner further argues that on January 31,1994, the petitioner sent by registered mail his "countermotion," affidavit and supporting financial documents indicating he had been paying child support. And therefore, the Court erred in finding that Dr. Puchner failed to submit supporting documents prior to the February 11,1994 contempt hearing. This Court noted in its February 21,1996, Order that "[w]here the alleged contemnor chooses not to present evidence on his or her own behalf, the trial court is not precluded from finding that the underlying conduct is contemptuous." (Order, at 13 (citing Noack v. Noack, 149 Wis. 2d 567, 575, 439 N.W.2d 600, 603 (Ct. App. 1989))). Thus, when the petitioner asked Judge Zick whether he had "read my affidavit," this question referred to all of the mailed documents. Thus it is the petitioner's contention that the Court erroneously believed that Dr. Puchner did not present any supporting documents . with his affidavit.

The Court having reviewed its decision and the exhibits submitted during the evidentiary hearing believes its decision is correct and finds that Dr. Puchner failed to submit supporting documents. Dr. Puchner stated in his countermotion submitted to Judge Zick on January 31, 1994,

> "I am obligated to pay child support to Minnesota and I have.... I am eager to resolve this issue and will provide evidence that not only have I been paying child support to Minnesota, but I have also tried to mail the money directly to Anne and it was returned to

> me in a deliberate effort to try to accrue interest and have me put in jail."

(Exh. 4: Puchner Aff., January 31, 1994 at 5(g) (emphasis added). This passage from Exhibit 4 indicates to the Court, in keeping with it prior ruling, that the petitioner viewed his countermotion as an opportunity to reserve the right to respond to the motions made by Mr. O'Neill. The petitioner's countermotion further reserved "the right to respond, via countermotions, affidavits, and supporting documents," (Exh. 4 at 2) and petitioner's attached affidavit stated he opted to address only scheduling matters. Again, this was not the correct procedural posture for Dr. Puchner to adopt. The petitioner was required to demonstrate that his conduct was not contemptuous and he failed to rebut the prima facie case of nonpayment of child support. Moreover, when asked by Judge Zick whether the petitioner had the child support money sent back from Minnesota, the petitioner responded "I have none " If the petitioner's child support checks had been returned uncashed from Minnesota to petitioner, the petitioner wouid have had immediate access to money from the uncashed child support checks.

The petitioner also contends that the Court has misinterpreted the transcript of the February 11, 1994 hearing and argues:

> "At the time of the hearing, when asking if he would read my documents, the court interrupted me in mid

> sentence. From the transcript, my sentence was, 'have you read my affidavit . . . (court interruption) . . . and supporting documents?" The court's interruption, "I never read affidavits . . ." came in the middle of my sentence. The court never finished it's sentence, the word supporting documents was mine."

(Motion to Reconsider: Puchner Aff.) The Court is also confident that its reading of the transcript is correct. The transcript of the February 11,1994 hearing offers the following interchange between Dr. Puchner and Judge Zick.

> Mr. Puchner: I'd ask if you read the affidavit, my counter
>
> The Court: I don't read affidavits at all. If you told me every thing--
>
> Mr. Puchner: You do not read--
>
> The Court: I do not read people's affidavits and things until I get--
>
> Mr. Puchner: --supporting documents

When Judge Zick stated "I do not read people's affidavits and things until I get . . ." (emphasis added), Dr. Puchner finished Judge Zick's statement by adding "supporting documents." The petitioner's contention that Judge Zick interrupted his sentence is not reflected in the transcript. Dr. Puchner asked in a complete sentence if Judge Zick read the affidavit, the countermotion (there is no mention of supporting documents). The Judge responded that he does not read affidavits at all. Dr. Puchner interrupts. The Judge clarifies that he does not read people's affidavits until The Judge was unable to finish his sentence which seems to be completed by Dr. Puchner adding the

phrase "supporting documents." The Court abides by its interpretation of the transcript that Judge Zick did not read Dr. Puchner's affidavit because it failed to contain supporting documents, namely any cancelled or uncancelled child support checks which would demonstrate that Dr. Puchner had, in fact, been paying child support. This reading of the transcript is bolstered by Dr. Puchner's affidavit, previousiy discussed, which indicates he "will" [future tense] provide evidence documenting his payment of child support. (Exh. 4.) The only evidence the Court has found which indicates that Dr. Puchner submitted supporting documents is in the January 11,1994 letter now submitted to this Court where Dr. Puchner states "I have presented and will continue to present all the returned checks." The Court finds evidence, such as the admission by Dr. Puchner that he no longer had any of the returned child support money as stated to Judge Zick during the contempt hearing, more substantial in that Judge Zick could have found the fact that Dr. Puchner no longer had the child support money exasperating, and consequently, contemptuous. The Court abides by its initial decision finding the contempt order for onpayment of child support valid.

In light of the circumstances of the February 11,1994 hearing and in keeping with the standard of review required in cases invoking the extraordinary remedy of 28 U.S.C. § 2254, the Court again holds that Dr. Puchner was validly held in contempt for nonpayment of child support.

For the foregoing reasons, IT IS HEREBY ORDERED that Puchner's Motion for Reconsideration is DENIED. The Court holds the underlying contempt order issued on February 11, 1994 by Judge Zick is valid.

The Court's previous Order dated February 21, 1996 wherein the Court ordered that Dr. Puchner be afforded a hearing before a circuit court judge in order to demonstrate that his inability to meet the purge conditions is not willful and intentional remains in effect. In light of this ruling, the Court denies the Motion for Temporary Stay of State Court Action filed March 11, 1996.

SO ORDERED this 14th day of March, 1996 at Milwaukee, Wisconsin.

/s/ ROBERT W. WARREN

APPENDIX D

STATE OF WISCONSIN
CIRCUIT COURT : WAUKESHA COUNTY
FAMILY COURT BRANCH

In Re the Marriage of:

ANNE C. PUCHNER,

Petitioner, Case No.: 93-FA-462

and

JOHN D. PUCHNER,

Respondent.

ORDER

Upon the hearing held before this Court on February 11, 1994, on the petitioner's December 6, 1993 motion, the petitioner appearing in person and by Attorney Bruce C. O'Neill, and the respondent participating by speaker phone, and the Court having reviewed the moving papers and having heard statements from petitioner's attorney and from the respondent, and the Court having found on the record that the respondent had the ability to pay the amounts set forth hereafter as to the placement study, child support arrearage, and Dr. Matusiak's bill.

IT IS ORDERED THAT:

1. The respondent is found in contempt for his intentional refusal to pay the petitioner $150.00 in reimbursement for one-half of her expenditure for the placement study by the Waukesha County Family Court Counseling Services. The respondent may purge himself of this contempt as set forth in the next paragraph.

2. The respondent is found in contempt for his intentional refusal to pay child support. His arrearage is $2,920.00 through the first half of February of 1994. As a sanction, the respondent is sentenced to 60 days in the Waukesha County Jail. The respondent may purge himself of this contempt and sanction by hereafter paying the petitioner $680.00 per month, payable on a bi-monthly basis of $340.00 on the first and fifteenth of each month with the first such payment due on February 15, 1994, which bi-monthly sum shall be allocated $240.00 to current support and $100.00 to the said arrearage of $2,920.00. Upon the satisfaction of the arrearage, the respondent shall continue to pay $340.00 bi-monthly with the $100.00 increment successively going to pay the $150.00 due the petitioner on the placement study; then the $1,095.00 due the petitioner under paragraph 3 hereof; and then any shortage due the petitioner from the respondent for reimbursement as to her payment of uninsured medical bills as to the child. If the respondent fails to timely make any such $340.00 payment and the petitioner's attorney advises the Court of that in writing, then, the Court shall issue a warrant for the Waukesha County Sheriff's Department to arrest the respondent to commence the said 60 day jail sentence.

3. Each party shall pay one-half of the total bill of Dr. Matusiak, the Court-appointed psychologist, which total bill to date is $5,190.00, which bill the Court finds to be reasonable. Since the petitioner has paid $3,690.00 of that bill, the respondent shall reimburse the petitioner $1,095.00 and shall pay Dr. Matusiak $1,500.00.

4. The petitioner withdrew the portions of her motion as to the insurance forms, the wage assignment, and the respondent's work schedule; and the Court deferred the portion of her motion as to attorney fees to a later hearing.

Dated at Waukesha, Wisconsin this 21st day of February, 1994.

BY THE COURT:

/s/

Honorable Willis J. Zick

APPENDIX E

STATE OF WISCONSIN
CIRCUIT COURT : WAUKESHA COUNTY
FAMILY COURT BRANCH

In Re the Marriage of:

ANNE C. PUCHNER,

Petitioner, Case No.: 93-FA-462

and

JOHN D. PUCHNER,

Respondent.

ORDER

Upon all the files, records and proceedings had herein, upon the motions filed by the petitioner and the respondent, and the hearings held before the Honorable Donald J. Hassin, Jr., in 1995 and 1996, and upon the decision on the record on August 27, 1996,

IT IS ORDERED THAT:

1. Sole legal custody of the parties' minor child, Paul Andrew Puchner, is awarded to the petitioner, Anne Hepperla, including the right to make all major decision as to the education, health and religion of the minor child.

2. Petitioner shall provide copies of the minor child's school, medical and dental records to her attorney on a quarterly basis, with the first such reports due on or about December 31, 1996, who in turn shall mail copies of those records to the respondent.

3. The respondent shall not have any contact, directly or indirectly, with any provider of services to the child including but not limited to health care providers, daycare providers or schools.

4. Primary physical placement of the minor child shall continue to be with the petitioner. The respondent shall have unsupervised alternate physical placement of the minor child on alternating weekends from 9:00 a.m. to 5:00 p.m., on Saturday and 9:00 a.m. to 5:00 p.m. on Sunday, commencing with the weekend of August 31-September 1, 1996. The exchange of the minor child shall take place at the Elm Grove police station or at any other law enforcement agency to which both parties agree in writing. The respondent shall not take the minor child outside of the 150 mile radius from the place of exchange.

5. The respondent shall not take the voice of the minor child by audiotape or videotape or any other means without the written permission of the petitioner.

6. If the respondent does not violate any of the orders of this court set forth in paragraphs 3-5 above from August 31, 1996 to August 31, 1997, then, alternate physical placement of the minor child shall be increased to 9:00 a.m. on Saturday to 5:00 p.m. on Sunday on the said alternating weekends and further shall be increased to include one week during the summer commencing in the summer of 1998. The respondent shall provide the petitioner with prior written notice by certified mail to her attorney of the said summer week no later than March 15 of each year.

7. Based upon the court's finding that the respondent intentionally shirked his employment as a physician from July of 1995 to August of 1996:

a) The respondent shall apply for a Wisconsin license as a physician no later than September 26, 1996 and forthwith shall file copies of all such applications and responses thereto with the court and forthwith shall serve copies on the attorney for the petitioner.

b) Contemporaneous with such application for a physician's license and continuing thereafter, the respondent shall pursue employment as a physician, until he procures employment as a physician practicing medicine.

c) Child support payable by the respondent to the petitioner shall be increased to 17% of the respondent's gross income commencing January 1, 1997, with a base imputed income of $110,000 per year, payable at a minimum of $1,558.33 per month, with the first payment due on January 1, 1997 and the first of every month thereafter. Payment shall be made to the Clerk of the Waukesha County Circuit Court and shall be by wage assignment. The respondent forthwith shall notify in writing the Clerk of Waukesha County Circuit Court and the attorney for the petitioner of his home address and shall give similar notice of any change in such address within 10 days of any change. The respondent also shall notify in writing the Clerk of Waukesha County Circuit Court and the attorney for the petitioner of any change of employer within 10 days. Such payment shall continue until the minor child reaches the age of 18 or graduates from high school, whichever occurs later, but no later than the age of 19. Forthwith upon the filing of his 1997 income tax returns and all subsequent returns during the time of his obligation for child support, the respondent shall provide the attorney for the petitioner with a copy of his federal and state income tax returns, including all W-2s, 1099s and K-1s. The present order of $680.00 per month child support payable by the respondent to the petitioner shall remain in effect until January 1, 1997. The respondent forthwith shall provide the court with a wage assignment as to such child support directed to his current employer, Aquinas Academy.

8. Based upon the court's finding that the respondent was in contempt of the judgment and orders by intentionally refusing to maintain $150,000 of life insurance coverage on his life for the benefit of the minor child, he is sentenced to 30 days in the Waukesha County Jail, which sanction he may purge by filing a copy of such a current life insurance policy (which can be term insurance) or evidence of uninsurability with this court by no later than October 26, 1996.

9. Based upon the court's finding that the respondent was in contempt of the judgment and orders by intentionally refusing to reimburse the petitioner for her payment of the $150 Family Court Counseling Services fee, he is sentenced to 15 days in the Waukesha County Jail, which sanction he may purge by making such payment to the petitioner by no later than September 26, 1996. Such payment shall be made through the Clerk of the Waukesha County Circuit Court.

10. Based upon the court's finding that the respondent was in contempt of the judgment and orders by intentionally refusing to maintain health insurance for the benefit of the minor child, he is sentenced to 30 days in the Waukesha County Jail, which sanction he may purge by providing such coverage consistent with the prior order amending judgment as to such coverage no later than November 15, 1996 and by contemporaneously providing a health insurance card or other written notice of the policy number to the attorney for the petitioner.

11. Based upon the court's finding that the respondent was in contempt of the judgment and orders for intentionally refusing to pay child support of $4,676.68 through June 30, 1996, he is sentenced to 60 days in the Waukesha County Jail, which sanction he may purge by making such payment of $4,676.68, together with 18% interest from February 15, 1994 or the date an original installment was due, whichever date is later, until the date of payment, but no later than February 23, 1997. Such payment shall be made through the Clerk of the Waukesha County Circuit Court.

12. The jail sentences in paragraphs 8 through 11 above shall be consecutive to one another.

13. The respondent shall reimburse the petitioner $716.98 as to the uninsured medical expenses of the minor child no later than November 25, 1996.

14. The respondent shall reimburse the petitioner $1,095 as to a payment by her of fees to the court appointed psychologist, Dr.

Itzhak Matusiak, as set forth in the court's February 21, 1994 order, by no later than February 23, 1997.

15. Waukesha County shall pay the court appointed psychologist, Dr. Itzhak Matusiak, and the guardian ad litem, Michael Finn, their unpaid fees by no later than September 26, 1996. The petitioner shall reimburse the County one-half of such payment to Dr. Matusiak minus $662.50 and the respondent shall reimburse the County one-half of such payment to Dr. Matusiak plus $662.50. Such reimbursements as to Dr. Matusiak shall be made no later than February 23, 1997. The petitioner and the respondent each shall reimburse the County one-half of the payment to Attorney Finn. Such reimbursements as to Attorney Finn shall be made no later than August 29, 1997.

16. Based upon the court's finding that the respondent was in contempt of the judgment and orders by his intentional conduct on July 9, 1995 and July 23, 1995 as to alternate physical placement of the child outside the presence of the respondent's mother, he is sentenced to 60 days in the Waukesha County Jail, consecutive to all other jail sentences under this order, which sanction he may purge by not violating any portion of this order prior to August 29, 1997.

17. The petitioner's request for a contribution to her attorney fees is denied.

18. The judgment and all other orders of the court, not inconsistent with this order, shall remain in effect.

Dated at Waukesha, Wisconsin this 23rd day of September, 1996.

BY THE COURT:

151

Honorable Donald J. Hassin, Jr.

APPENDIX F

STATE OF WISCONSIN
CIRCUIT COURT : WAUKESHA COUNTY
FAMILY COURT BRANCH

In Re the Marriage of:

ANNE C. PUCHNER,

Petitioner,

And

JOHN D. PUCHNER,

Respondent.

ORDER

Case No. 93-FA-462

Upon all the files, records and proceedings had herein, and with reference to the petitioner' s October 22, 1996 motion for revision of orders and February 6, 1997 motion, and with reference to the respondent's motions filed with this cour0t on April 28, May 13 and May 15, 1997, as well as his motion for review of court orders and his motion for removal of Guardian ad Litem, and upon the hearings before this court, the Honorable Mark S. Gempeler presiding, on April 30 and May 16, 1997, the petitioner, Anne C. Hepperla, appearing in person and by Attorney Bruce C. O'Neill, the respondent, John D. Puchner, appearing pro se, and Attorney Michael J. Finn appearing as the Guardian ad Litem, and the court having rendered its decision on the record on April 30, 1997 as to the respondent's motions for review of orders and for removal of Guardian ad Litem, and the court having rendered its decision on the record as to the petitioner's motions and the balance of the respondent's motions on the record on May 16, 1997,

IT IS ORDERED THAT:

1. The petitioner's February 6, 1997 motion for the entry of an order directing respondent to commence serving his consecutive

jail sentences under paragraphs 8, 10, 11 and 13 of this court's September 23, 1996 order is granted, and the respondent shall commence serving such 180 days of jail sentences in the Waukesha County Jail on May 16, 1997. The respondent shall be entitled to release under the Huber law for alternate physical placement with the minor child, for his employment by Aquinas Academy, and for his employment as a physician including any interviews or tests related to his obtaining a medical license and appointment as a physician. The respondent shall obey all rules of the Waukesha County Jail including those as to Huber privileges.

2. The petitioner's February 6, 1997 motion to have the respondent found in contempt for violations of this court's September 23, 1996 order is granted, and:

(a) The respondent is found in contempt for his intentional refusal to apply for a Wisconsin license as a physician and to pursue employment as a physician, in violation of paragraph 7(a) and (b) of this court' s September 23, 1996 order, and the respondent therefore is sentenced to 30 days in the Waukesha County Jail, consecutive to all other sentences. Such sentence is stayed until a hearing before this court on September 8, 1997 at 11:00 a.m., when the court will review the respondent's efforts to obtain a medical license and to obtain employment as a physician, in Wisconsin or any other state, which efforts shall be reasonable and in good faith.

(b) The respondent is found in contempt for his intentional refusal to pay child support, which was in arrears by $10,325.65 through May of 1997, in violation of Paragraph 7(c) of this court's September 23, 1996 order, and the respondent therefore is sentenced to 30 days in the Waukesha County Jail, consecutive to all other sentences. Such sentence is stayed until a hearing before this court on September 8, 1997 at 11:00 a.m., when the court will review the respondent's efforts to obtain a medical license and to obtain employment as a physician.

(c) The respondent is found in contempt for his intentional refusal to reimburse the petitioner $716.98 as to unreimbursed medical expenses of the child, in violation of Paragraph 13 of this

court's September 23, 1996 order, and the respondent therefore is sentenced to 15 days in the Waukesha County Jail consecutive to all other sentences. Such sentence is stayed until a hearing before this court on September 8, 1997 at 11:00 a.m., when the court will review the respondent's efforts to obtain a medical license and to obtain employment as a physician.

(d) The respondent is found in contempt for his intentional refusal to reimburse the petitioner $ 1,095 as to court-appointed psychologist fees, in violation of Paragraph 14 of this court's September 23, 1996 order. Sentencing is deferred to a hearing before this court on September 8, 1997 at 11:00 a.m., when the court will review the respondent's efforts to obtain a medical license and to obtain employment as a physician.

3. The petitioner's February 6, 1997 motion for entry of an order clarifying paragraph 6 of this court's September 23, 1996 order is granted, and the respondent shall not be entitled to the increased alternate physical placement with the child on weekends and in the summer due to his violation of Paragraph 3 of the September 23, 1996 order, by his direct contact with Ms. Romona Powers, a provider of services to the child.

4. The petitioner's October 22, 1996 motion for the entry of an order revising this court's September 23, 1996 order is granted, based on this court's finding that the modification is necessary because the current custodial conditions are emotionally harmful to the best interest of the child, and further based upon this court's finding that the respondent was the author of petitioner's Exhibits 3, 3A and 4 (Notice of First Warning of Trial to Excommunicate, Religious Teaching Document No. I for Paul Puchner, and Final Warning prior to Trial of Excommunication), and the respondent's alternate physical placement with the child on alternating weekends (with the next weekend being that of May 24-25,1997) shall be supervised until at least September 8, 1997 and shall take place only at the Wisconsin School of Professional Psychology, Inc., 9120 West Hampton Avenue, Suite 90, in Milwaukee, with the respondent to bear the entire expense of such supervision and such alternate physical

placement being subject to the weekend hours that such supervision is offered by the Wisconsin School of Professional Psychology, Inc

5. The respondent's motions are denied.

6. Waukesha County forthwith shall pay the Guardian ad Litem, Attorney Michael J. Finn, his unpaid fees; and the court shall address the apportionment of the reimbursement of those fees by the parties in the future. The petitioner's request for an award of attorney fees against the respondent is deferred to the future.

Dated at Waukesha, Wisconsin this 19th day of May, 1997.

BY THE COURT:

/s/_____
Hon. Mark S. Gempeler